No. 97-1192

In the Supreme Court of the United States

OCTOBER TERM, 1997

SWIDLER & BERLIN, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN CORPORATE COUNSEL ASSOCIATION, NATIONAL HOSPICE ORGANIZATION, TRIAL LAWYERS FOR PUBLIC JUSTICE, AND AMERICAN PSYCHIATRIC ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members throughout the United States. Founded in 1958, NACDL seeks to promote the effective representation of defendants in criminal cases. The attorney-client and work-product issues in this case are central to NACDL's

[1] The parties have consented to the filing of this brief under S. Ct. R. 37.2, and their letters of consent have been lodged with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

members and their clients. NACDL has appeared as amicus curiae in several cases in this Court. See, *e.g.*, *Almendarez-Torres* v. *United States*, 118 S. Ct. 1219 (1998); *Hudson* v. *United States*, 118 S. Ct. 488 (1997); *Moran* v. *Burbine*, 475 U.S. 412 (1986).

The American Corporate Counsel Association is a non-profit national bar association for in-house corporate counsel. Since its founding in 1982, ACCA has grown to more than 10,600 members in approximately 4,600 corporations and other private-sector organizations. The attorney-client and especially the work-product issues presented in this case are of direct concern to ACCA's members and the clients they represent. ACCA has participated as *amicus curiae* in a number of cases before this Court. See, *e.g.*, *Virginia Bankshares* v. *Sandberg*, 501 U.S. 1083 (1991); *Frazier* v. *Heebe*, 482 U.S. 641 (1987).

The National Hospice Organization is a non-profit, public-benefit, charitable organization dedicated to meeting the unique needs of terminally ill people and their families. Established in 1978, NHO represents approximately 2,400 hospice programs, some 4,000 hospice professionals, and 48 state hospice organizations. In addition to the physical, spiritual, social, and emotional care and support provided by hospices, people in the final stage of life often need legal services, and the attorney-client issue in this case therefore is of particular concern to NHO, its members, and those they serve. NHO has previously appeared as *amicus curiae* in this Court. See, *e.g.*, *Vacco* v. *Quill*, 117 S. Ct. 2293 (1997); *Washington* v. *Glucksberg*, 117 S. Ct. 2258 (1997); *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

Trial Lawyers for Public Justice, P.C., is a national public-interest law firm devoted to the improvement of our nation's laws and system of justice. Founded in 1982, TLPJ is now supported by a nationwide network of more than 1,500 attorneys. TLPJ believes that the decision below threatens our justice system by undermining the attorney-client and work-product privileges. TLPJ has previously participated as *amicus curiae* in several cases before this Court. See, *e.g.*, *Amchem Products, Inc.* v. *Windsor*, 117 S. Ct. 2231 (1997); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996).

The American Psychiatric Association has participated in numerous cases in the Court, including *Jaffee* v. *Redmond*, 116 S. Ct. 1923 (1996), which recognized the psychotherapist-patient privilege. The privileged nature of patient communications is a basic tenet of psychiatry. APA's members, and their patients, have a strong interest in ensuring that the *Jaffee* privilege not be weakened by disclosures after a patient's death, which would upset patients' expectations and impair the important purposes served by the privilege.

SUMMARY OF ARGUMENT

I. The court of appeals' decision that the absolute attorney-client privilege does not survive the death of the client is unprecedented and contrary to the settled understanding of the bench and bar. Although the ruling below is framed as a purported exception to the general rule, the panel's reasoning in fact is flatly inconsistent with the fundamental premises of the basic privilege itself. Moreover, the majority grossly underestimated the chilling effect of posthumous disclosure on clients' willingness to communicate fully and forthrightly with their lawyers. In the light of "reason and experience" (Fed. R. Evid. 501), an absolute rather than qualified posthumous privilege is necessary to serve the time-honored purpose of the attorney-client privilege: to facilitate legal representation by encouraging complete candor and truthfulness on the part of clients.

II. Contrary to the court of appeals' decision, the stringent protection for a lawyer's mental-impression work product applies to his notes of a preliminary meeting with a client. No less at an initial meeting than at any other, what the lawyer elicits from the client, as well as what he elects to record and the language he uses to do so, all reflect the exercise of the lawyer's professional judgment and reveal his (or her) mental processes. Accordingly, the court below erred in applying the lax work-product standard applicable to purely factual information, rather than the more stringent standard for mental-impression work product, to allow the disclosure of factual material in the lawyer's notes that reveal his thoughts and legal strategies. A contrary rule would discourage

counsel from taking notes and interfere with effective legal representation.

ARGUMENT

A divided panel of the D.C. Circuit, over the vigorous dissent of Judge Tatel, incorrectly decided two issues involving the attorney-client and work-product privileges that are of surpassing importance to our adversarial system of justice and to the legal profession and the clients it represents. Both of the panel's rulings are unprecedented and conflict with an unbroken line of decisions of this and other courts over many decades. Moreover, the issues presented are recurring ones for the legal system and arise routinely in the practice of law. As Judge Tatel explained, the majority's "two new holdings—one chilling client disclosure, the other chilling lawyer note-taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process." Pet. App. 32a–33a (Tatel, J., dissenting from denial of rehearing in banc). Because the panel's rulings are fundamentally misconceived under "the principles of the common law as * * * interpreted * * * in the light of reason and experience" (Fed. R. Evid. 501), the decision below should be reversed.

I. THE ABSOLUTE ATTORNEY-CLIENT PRIVILEGE SURVIVES THE DEATH OF THE CLIENT.

In this case, the Independent Counsel obtained grand-jury subpoenas for notes of a meeting between James Hamilton, a private attorney, and his client, Vincent W. Foster, Jr., who was then a White House official and who, nine days after the meeting, committed suicide. It is common ground in this case that their discussion, when it occurred, was covered by the attorney-client privilege. Pet. App. 2a. Thus, the notes of the meeting were subject to subpoena only because the court of appeals held that the death of the client qualifies what would otherwise be an absolute privilege and that an *ad hoc* balancing test determines whether the post-death qualified privilege is outweighed by the need for the material in the criminal investigation.

The court of appeals' decision cannot withstand analysis. Much of the court's reasoning is flatly inconsistent with the settled

understanding of the attorney-client privilege. Moreover, none of the reasons advanced by the majority remotely justifies a departure from the established rule, endorsed by courts and legislatures alike, that the privilege survives the death of the client.

The court of appeals' decision, if upheld by this Court, will adversely affect the legal system on a regular and even daily basis. Most directly, it will be felt, as here, when material or information is sought to be compelled after the death of the client. By itself, that is a significant and recurring consequence. But the decision also will come to bear *every time* a lawyer counsels a client on the privileged nature of their communications and a client must decide, in light of the privilege available, whether to make a full and candid disclosure to his lawyer of the most highly incriminating, embarrassing, or otherwise sensitive facts the client possesses. As Judge Tatel aptly observed in dissent (Pet. App. 20a–21a), the attorney no longer can provide assurance that proper attorney-client communications (that is, not in furtherance of a crime or fraud) will be absolutely privileged, but instead must give much more complex and qualified advice that the privilege ultimately depends upon a *post-hoc* and free-form balancing test that will turn on circumstances that cannot then be foreseen. The result of the court of appeals' decision is to confront clients—who already are facing some legal problem for which they are seeking professional assistance—with uncertain and confusing advice about the privilege that in the end can be little more than cold comfort. The ruling thus has an immediate and direct effect on the everyday practice of law and the routine decisions that clients make, and it unavoidably will deter candid client disclosures that, until now, were encouraged by the absolute attorney-client privilege.

A. An Absolute Attorney-Client Privilege Serves To Encourage Complete And Candid Communications By Clients, And The Common Law And Evidence Codes Recognize That The Privilege Does Not Abate Upon The Death Of The Client.

As this Court has recognized, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The fundamental purpose of the privilege

"is to encourage full and frank communications between attorneys and their clients"; it "'rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out'" and is essential to enable the client to be free "'to make full disclosure to their attorneys.'" *Ibid.* In this way, the privilege "'promote[s the] public interests in the observance of law and administration of justice.'" *Ibid.* In sum, the privilege reflects both that "sound legal advice or advocacy serves public ends," and that "such advice or advocacy depends upon the lawyer's being fully informed by the client * * * [which will occur only when the client is] 'free from the consequences or the apprehension of disclosure.'" *Ibid.* See also *Jaffee* v. *Redmond*, 116 S. Ct. 1923, 1928 (1996) (the attorney-client privilege is "'rooted in the imperative need for confidence and trust,'" and "the mere possibility of disclosure * * * [that] may cause embarrassment or disgrace * * * may impede development of the confidential relationship"); *United States* v. *Zolin*, 491 U.S. 554, 562 (1989).

With striking uniformity, the law long has recognized that the absolute attorney-client privilege continues after the death of the client. As Judge Tatel demonstrated in detail below, "[s]ince at least the mid-nineteenth century, the common law has protected the attorney-client privilege after a client's death" (Pet. App. 17a), and courts and legislatures consistently have adhered to that principle. This Court has ruled that the privilege survives the client's death,[2] as have lower federal courts[3] and state courts[4] as well as

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[2] See *Glover* v. *Patten*, 165 U.S. 394, 406–408 (1897). See also *Chirac* v. *Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826) (Story, J.) ("confidential communications between client and attorney, are not to be revealed at any time"); *Blackburn* v. *Crawfords*, 70 U.S. (3 Wall.) 175, 192–194 (1865).

[3] See, *e.g.*, *United States* v. *Osborn*, 561 F.2d 1334, 1340 (9th Cir. 1977); *Baldwin* v. *CIR*, 125 F.2d 812, 814 (9th Cir. 1942); *United States* v. *Costen*, 38 F. 24, 24 (C.C.D. Colo. 1889) (attorney-client privilege provides "the absolute assurance that that lawyer's tongue is tied from ever disclosing [the client's communication.]"); *Dixson* v. *Quarles*, 627 F. Supp. 50, 53 (E.D. Mich.), aff'd mem., 781 F.2d 534 (6th Cir. 1985), cert. denied, 479 U.S. 935 (1986).

[4] See, *e.g.*, *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 70–72 (Mass. 1990); *Hatton* v. *Robinson*, 31 Mass. (14 Pick.) 416, 422 (1834) (under the attorney-client privilege, "the mouth of the attorney shall be for ever sealed"). Indeed, courts in at least thirty-six states and the District of Columbia have recognized that the privilege continues after the client's death. See *Bassett* v. *Newton*, 658 So. 2d 398, 401 (Ala. 1995) (privileged communications "permanently protected from disclosure"); *State* v. *Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976) (criminal case); *Fox* v. *Spears*, 93 S.W. 560, 562 (Ark. 1906); *People* v. *Pena*, 198 Cal. Rptr. 819, 828–829 (Cal. App. 1984) (criminal case); *Peyton* v. *Werhane*, 11 A.2d 800, 803 (Conn. 1940); *State ex rel. State Highway Department* v. *62.96247 Acres of Land*, 193 A.2d 799, 814 (Del. Super. Ct. 1963) (citing Wigmore treatise); *Oliver* v. *Cameron*, 11 D.C. (MacArth. & M.) 237, 239 (1880); *Smith* v. *Smith*, 152 S.E.2d 560, 565 (Ga. 1966); *In re Estate of Marek*, 480 P.2d 609 (Idaho 1971); *Hitt* v. *Stephens*, 675 N.E.2d 275, 278 (Ill. App. 1996), appeal denied, 679 N.E.2d 380 (Ill. 1997); *Mayberry* v. *State*, 670 N.E.2d 1262, 1266–1267 (Ind. 1996) (criminal case); *Bailey* v. *Chicago, Burlington & Quincy Railroad Co.*, 179 N.W.2d 560 (Iowa 1970) (adopting Wigmore position); *In re Curtis' Estate*, 394 P.2d 59, 62 (Kan. 1964); *Carter* v. *West*, 19 S.W. 592, 593 (Ky. 1892); *Morris* v. *Executors of Cain*, 1 So. 797, 807–808 (La. 1887); *Tillinghast* v. *Lamp*, 176 A. 629, 632 (Md. 1935); *Rich* v. *Fuller*, 666 A.2d 71, 74–75 (Me. 1995); *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 70–72 (Mass. 1990) (criminal case); *Lorimer* v. *Lorimer*, 83 N.W. 609, 611 (Mich. 1900); *In re Layman's Will*, 42 N.W. 286, 287 (Minn. 1889) (communications repugnant to "character or reputation" of decedent remain privileged); *McCaffrey* v. *Estate of Brennan*, 533 S.W.2d 264, 266–267 (Mo. App. 1976); *Herrig* v. *Herrig*, 648 P.2d 758, 760, 762 (Mont. 1982); *Lennox* v. *Anderson*, 1 N.W.2d 912, 916 (Neb.), modified on other grounds, 3 N.W.2d 645 (Neb. 1942); *Clark* v. *Second Judicial Dist. Court*, 692 P.2d 512, 514 (Nev. 1985); *Scott* v. *Grinnell*, 161 A.2d 179, 183 (N.H. 1960); *Anderson* v. *Searles*, 107 A. 429, 430 (N.J. 1919) (citing Wigmore); *People* v. *Modzelewski*, 611 N.Y.S.2d 22, 23 (N.Y. App. Div.) (criminal case), appeal denied, 616 N.Y.S.2d 22 (N.Y. 1994); *Hughes* v. *Boone*, 9 S.E. 286, 292 (N.C. 1889) (privilege is "perpetual"); *In re Graf's Estate*, 119 N.W.2d 478, 481 (N.D. 1963); *Swetland* v. *Miles*, 130 N.E. 22, 23 (Ohio 1920); *Cooper* v. *State*, 661 P.2d 905, 907 (Okla. Crim. App. 1983) (criminal case); *State* v. *Doster*, 284 S.E.2d 218, 219 (S.C.) (criminal case), cert. denied, 454 U.S. 1030 (1981); *Miller* v. *Pierce*, 361 S.W.2d 623, 625 (Tex. Civ. App.—Eastland 1962, no writ); *Anderson* v. *Thomas*, 159 P.2d 142, 147 (Utah 1945); *Chahoon* v. *Commonwealth*, 62 Va. (21 Gratt.) 822, 836 (1871) (criminal case) ("[w]ith respect to [privileged] communications, the mouth of the [attorney] is forever sealed"); *Martin* v. *Shaen*, 156 P.2d 681, 684 (Wash. 1945); *In re Smith's Estate*, 57 N.W.2d 727 (Wisc. 1953).

English courts.[5] In addition, each of the 20 state legislatures to have addressed the issue has provided that the absolute attorney-

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[5] See *Bullivant* v. *Attorney-General for Victoria*, 1901 App. Cas. 196, 206 (appeal taken from Q.B.); 13 HALSBURY'S LAWS OF ENGLAND para. 84 at 67 (4th

client privilege does not abate upon the death of the client.[6] Similarly, the Rules of Evidence proposed by this Court in 1972 maintained the privilege after the client's death,[7] as have other model evidence codes.[8] The American Bar Association and a number of commentators likewise have endorsed this common-law rule.[9] And in the analogous situation involving the dissolution or bankruptcy of a corporation, the corporation's attorney-client privilege is routinely recognized to continue.[10]

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ed. 1975); see also *Regina* v. *Derby Magistrates' Court*, [1996] 1 App. Cas. 487, 509 (appeal from Q.B. Div'l Ct.) (Lloyd, L.J., concurring) ("[i]f the client had to be told that his communications were only confidential so long as he had 'a recognisable interest' in preserving the confidentiality, and that some court on some future occasion might decide that he no longer had any such recognisable interest, the basis of the confidence would be destroyed or at least undermined").

[6] See Pet. App. 17a (Tatel, J., dissenting).

[7] See Proposed Fed. R. Evid. 503(c) & adv. comm. note (d)(2), 56 F.R.D. 183, 236, 240 (1972).

[8] See Unif. R. Evid. 502(c) (1986); Model Code of Evid. R. 209(c)(i) & cmt. 6 (1942).

[9] See American Bar Ass'n, FORMAL OPINION 91 (Mar. 8, 1933); American Bar Ass'n, INFORMAL OPINION 1293 (June 17, 1974); 8 John H. Wigmore, EVIDENCE § 2323 at 630–631 (McNaughton rev. ed. 1961); Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45 (1992); Section of Litigation, American Bar Ass'n, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 234 (3d ed. 1996); Paul R. Rice, THE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §§ 2:5–2:6 (1993). Even commentators who criticize the rule recognize that it is firmly established and that a contrary rule is not supported by judicial or legislative authority. See, *e.g.*, PROPOSED RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 & cmts. c & d, Reporter's Note to Comments c & d (Proposed Final Draft No. 1, Mar. 29, 1996) (provision that attorney-client privilege survives the death of the client; although the commentary urges an exception, it acknowledges that "[t]he law recognizes no exception," that cases "routinely hold that the privilege survives," and that "[n]o extant case authority supports the proposed good-cause exception urged in the Comment").

[10] See *CFTC* v. *Weintraub*, 471 U.S. 343, 358 (1985); *Yosemite Inv., Inc.* v. *Floyd Bell, Inc.*, 943 F. Supp. 882, 883 (S.D. Ohio 1996) ("the right to assert the attorney-client privilege is an incident of control of the corporation and remains with corporate management as the corporation undergoes mergers, takeovers, name changes or even dissolutions"); *Bass Public Ltd. Co.* v. *Promus Cos., Inc.*, 868 F. Supp. 615, 619–620 (S.D.N.Y. 1994); *Medcom Holding Co.* v. *Baxter Travenol Laboratories*, 689 F. Supp. 841, 842–843 (N.D. Ill. 1988); *Talley Industries, Inc.* v. *United States*, 188 U.S.P.Q. (BNA) 368, 371–373 (Ct. Cl. 1975) (dissolution of corporation; analogizing to authorities involving death of individual client).

These consistent authorities convincingly establish that the attorney-client privilege continues after the client's death under "the principles of the common law * * * interpreted in the light of reason and experience." Fed. R. Evid. 501; see also *Jaffee*, 116 S. Ct. at 1928, 1930 (provision in Proposed Federal Rules of Evidence for psychotherapist privilege supported adoption of federal privilege as a matter of common law under Fed. R. Evid. 501); *id.* at 1929 & n.11, 1930 (uniform acceptance of psychotherapist privilege by state courts and legislatures supported adoption of federal common-law privilege under Rule 501; "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege").[11] The lesson of history and experience—grounded in human nature and common sense—has been that abrogation of the absolute attorney-client privilege upon the death of the client would discourage the full and forthright disclosure by the client to the attorney that the privilege is designed to promote. Absent a continued privilege, clients would be subject to "the consequences or the apprehension of disclosure" (*Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888)) that—as the basic theory of the privilege recognizes—chills candid and complete communication.

> The subjective freedom of the client, which it is the purpose of the privilege to secure, * * * could not be attained if the client understood that, * * * after the client's death, the attorney could be compelled to disclose the confidences * * *. It has therefore never

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[11] The solitary exception is, as Judge Tatel described it (Pet. App. 29a (Tatel, J., dissenting from denial of rehearing in banc)), "a never-cited opinion of a mid-level Pennsylvania appellate court." See *Cohen* v. *Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976); see also page 15 note 17, *infra*. This aberrational decision—which was not even a criminal case—does not support the panel's ruling in this case and does not even begin to offset the overwhelming weight of contrary authority. See, *e.g.*, *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 71–72.

been questioned * * * that the privilege continues * * * even after the death of the client.

Wigmore § 2323 at 630–631.

B. The Panel Erred In Holding That The Death Of The Client Results In A Qualified Attorney-Client Privilege In Criminal Cases.

1. The panel's reasoning is inconsistent with the fundamental principles underlying the attorney-client privilege.

The decision below rests on a number of conclusions that are irreconcilable with the basic and long-accepted premises of the attorney-client privilege. Although couched in terms of an exception to the privilege upon the death of the client, the panel majority's reasoning is, in reality, at odds with the foundations of the privilege itself.

a. To begin with, the majority asserted that "the privilege obstructs the truth-finding process" and therefore must be "narrowly construed." Pet. App. 6a. However, the consistent judgment of history and experience has been that the privilege is essential to the sound administration of justice and must be applied to accomplish its paramount purposes. See page 6, *supra*; *Jaffee*, 116 S. Ct. at 1928. This principle is fully applicable to grand jury proceedings. See *United States* v. *Calandra*, 414 U.S. 338, 346 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).[12]

Moreover, contrary to the panel's reasoning, this Court has recognized that complete and candid disclosures are unlikely to occur in the first place without the protections of the privilege, and therefore "[a]pplication of the attorney-client privilege to communications such as those involved here * * * puts the adver-

[12] Indeed, the D.C. Circuit itself has recognized the overarching public purposes served by the privilege notwithstanding any incidental effect on fact-finding. See *Rosen* v. *NLRB*, 735 F.2d 564, 572 (D.C. Cir. 1984) (per Starr, J.) ("[t]he attorney-client privilege is but one of several privileges that prevent parties themselves from adducing particular evidence, and thus create an obstacle to fact finding due to the broad judgment that the value of introducing such evidence is outweighed by the harm inflicted upon other policies and values").

sary in no worse position than if the communications had never taken place." *Upjohn*, 449 U.S. at 395; see also *Jaffee*, 116 S. Ct. at 1929 ("[T]he likely evidentiary benefit that would result from denial of the privilege is modest" because "[w]ithout a privilege, much of the desirable evidence to which litigants * * * seek access * * * is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged"); *id.* at 1928; *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 803 n.23 (1984).

b. In addition, the majority suggested that "[i]n the sort of high-adrenalin situation likely to provoke consultation with counsel," the client has adequate incentives to make full disclosure to his lawyer even if the communication is not covered by an absolute attorney-client privilege. Pet. App. 7a. This Court, however, has squarely rejected such reasoning: "the common law has recognized the value of the privilege in further facilitating communications" notwithstanding that "an individual trying to comply with the law or faced with a legal problem * * * has strong incentive to disclose information to his lawyer." *Upjohn*, 449 U.S. at 393 n.2.

c. The majority also reasoned that the privilege should not continue after the client's death because the client was no longer available as an alternative source of the information. Pet. App. 7a. But the possibility of obtaining the desired information from a source other than the attorney has never been the basis for the privilege. See Pet. App. 25a (Tatel, J., dissenting) (discussing numerous situations where attorney-client privilege would apply even though information was not otherwise available).

Furthermore, the possibility of eliciting the information directly from the client during his lifetime is considerably more theoretical than real. While it is conceivable that the client in a criminal investigation would waive the attorney-client privilege (which also could be done by the representative of the client after the client's death), or would relinquish his Fifth Amendment right against self-incrimination through waiver or a grant of immunity from the prosecutor, such circumstances are rare and the prospect of their occurrence remote.

In the end, the attorney-client privilege does not rest on the improbable assumption that the evidence sought from the lawyer will be available from the client. Rather, it embodies the twin principles that such evidence is unlikely to come into existence at all absent the privilege (see page 10, *supra*) and that any marginal unavailability of evidence is a price worth paying for the overriding benefits of the privilege to the legal system (see page 6, *supra*).

d. Finally, the majority concluded that the post-death privilege in criminal cases is governed by "a case-by-case balancing" to determine whether the "relative importance [of the communications sought] is substantial" because they "bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence." Pet. App. 8a, 10a. Once again, this Court has refused to adopt an *ad hoc* balancing test for the attorney-client privilege, holding that such an amorphous standard is antithetical to the certainty necessary for an effective privilege:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Upjohn, 449 U.S. at 393; see also *Jaffee*, 116 S. Ct. at 1932 (rejecting balancing test for psychotherapist privilege because "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege").[13] Unavoidably, the outcome of

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[13] Other courts too have rebuffed similar efforts to use a *post-hoc* balancing test to carve out exceptions to the attorney-client privilege. See, *e.g.*, *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 71 (holding that, in cases involving the death of the client, courts do "not weigh competing interests," and rejecting prosecutor's argument that the "court engage in a * * * weighing and balancing of interests"); *People* v. *Knuckles*, 650 N.E.2d 974, 981–982 (Ill. 1995) (rejecting a "'public interest' exception to the attorney-client privilege," and noting that the justification for the privilege does not diminish with "the passage of time").

a balancing test that turns on such factors as the relative importance of the evidence to the individual case and the availability of the evidence from other sources cannot be predicted *ex ante* at the time of the attorney-client communication and indeed can lead to inconsistent decisions by courts in similar circumstances. See *Upjohn*, 449 U.S. at 393. Accordingly, contrary to the panel's blithe assurance that its case-by-case balancing approach "produces none of the murkiness that persuaded the [Supreme] Court in *Upjohn* and *Jaffee* to reject the limitations proposed here" (Pet. App. 10a), it is clear that the decision below creates exactly such murkiness and is incompatible with the long-recognized need for an absolute rather than a qualified privilege to safeguard attorney-client communications.

2. A qualified posthumous privilege in criminal cases will deter full and candid communications by clients.

Central to the majority's holding was the belief that a "discrete exception" to the absolute attorney-client privilege that created a "posthumous limitation of the privilege" would not deter full and candid disclosures by clients to their attorneys. Pet. App. 8a. In particular, in the majority's view, clients would not be sufficiently concerned about the harm to their reputations from the posthumous revelation of incriminating or embarrassing information that they would be discouraged from imparting such information to their lawyers in the first place. According to the majority, "we would expect the restriction's chilling effect to fall somewhere between modest and nil." *Id.* at 7a. This is a completely unrealistic assessment that is belied by the law of privilege and the lessons of human experience.

First of all, the majority entirely ignored the client's concern over the effects of the posthumous disclosure of incriminating or embarrassing information about himself on his family, friends, and colleagues. Needless to say, such disclosures can be devastating to survivors. So, too, the panel overlooked that a client's communications can—and often do—contain incriminating or embarrassing information about others, including his loved ones and associates. The disclosure of such information to a prosecutor after

the client's death can expose these third parties not only to disgrace but to criminal prosecution. And, in addition to other sanctions, such proceedings can have enormous financial implications for his survivors due to fines, restitution, forfeiture, and even attorneys' fees (cf. *Bennis* v. *Michigan*, 516 U.S. 442 (1996)); although the court below recognized a client's legitimate and substantial concern to provide for his survivors' economic well-being and thus to protect them from civil suit resulting from disclosure (Pet. App. 6a), it entirely ignored the same potentially ruinous effect of their criminal prosecution. Any of these consequences could well discourage a client's candid discussions with his lawyer in the absence of an absolute posthumous privilege. See Pet. App. 24a (Tatel, J., dissenting); American Bar Ass'n, INFORMAL OPINION 1293 (June 17, 1974) (posthumous disclosure of confidential information conveyed by the client "could lead to numerous serious problems involving the client's representatives, surviving relatives and business associates" and "would be in contravention of the very purpose of the privilege"); 2 Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE § 199 at 380 (2d ed. 1994) ("[c]learly a client is concerned not only about himself but about his larger human situation that includes spouses, parents, children, siblings, and extended family, friends, and business associates").[14]

Beyond that, the panel plainly was mistaken in minimizing people's concern about their posthumous reputations and the deterrent effect that can have on frankness and truthfulness. As discussed above, it long has been recognized that the absolute attorney-client privilege survives the client's death and that this continuing privilege is necessary to ensure candid communications between the client and his lawyer during the client's life. The panel's conclusion flies in the face of the accumulated wis-

[14] Contrary to the Independent Counsel's assertion (IC Br. in Opp. 13–14), it is irrelevant that such statements concerning others may not be protected by the client's Fifth Amendment privilege against self-incrimination. The attorney-client privilege is broader than the self-incrimination privilege, and the relevant issue is whether the client's concerns about family and friends would affect his voluntary communications with his attorney absent a continuation of the absolute privilege after his death.

dom embodied in this rule. By itself, this is enough to cast the gravest doubt on the decision below.

What is more, other absolute privileges follow exactly the same rule that the privilege survives the death of the declarant who holds the privilege. Thus, the priest-penitent privilege,[15] the doctor-patient privilege,[16] the psychotherapist-patient privilege,[17] and the spousal privilege for confidential communications[18] all continue unabated after the death of the speaker. This unanimity in privilege law—which the panel did not consider, let alone distinguish—provides telling confirmation of the need for the post-death continuation of an absolute privilege in order to encourage the *inter vivos* communication of highly sensitive information.[19]

[15] See Proposed Fed. R. Evid. 506(c) & adv. comm. note (c), 56 F.R.D. at 247, 249; *Ryan* v. *Ryan*, 642 N.E.2d 1028, 1034 (Mass. 1994).

[16] See *Jewell* v. *Holzer Hosp. Found.*, 899 F.2d 1507, 1513–1514 (6th Cir. 1990); *Leritz* v. *Koehr*, 844 S.W.2d 583, 584 (Mo. App. 1993); *Rittenhouse* v. *Superior Court*, 1 Cal. Rptr. 2d 595, 597 (Cal. App. 1991); *Prink* v. *Rockefeller Ctr., Inc.*, 398 N.E.2d 517, 520 (N.Y. 1979); Wigmore § 2387 at 853 ("The object of the privilege is to secure subjectively the patient's freedom from apprehension of disclosure. It is therefore to be preserved even after the death of the patient").

[17] See Proposed Fed. R. Evid. 504(a), 56 F.R.D. at 241; *Williams* v. *Commonwealth*, 829 S.W.2d 942, 944 (Ky. App. 1992); *Sims* v. *State*, 311 S.E.2d 161, 165–166 (Ga. 1984). The broad potential of the decision below is demonstrated by a recent lower-court opinion holding—in reliance on this case and *Cohen* v. *Jenkintown Cab* (see page 9 note 11, *supra*)—that the Pennsylvania psychotherapist-client privilege was, in the circumstances there presented, no longer absolute after the death of the client. *In re Subpoena No. 22*, Dkt. No. 20 Phil. 1997, 1998 Pa. Super. LEXIS 140 (Pa. Super. Ct. Mar. 2, 1998).

[18] See *Curran* v. *Paskek*, 886 P.2d 272, 276 (Wyo. 1994); *Merrill* v. *William E. Ward Ins.*, 622 N.E.2d 743, 753 (Ohio App. 1993); *Prink*, 398 N.E.2d at 520; *Georgia Int'l Life Ins. Co.* v. *Boney*, 228 S.E.2d 731, 734 (Ga. App. 1976); Wigmore § 2341 at 673.

[19] The law recognizes legally protectable interests in reputation in a number of contexts, such as the law of defamation. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); see also *Spencer* v. *Kemna*, 118 S. Ct. 978, 991 & nn.3–6 (1998) (Stevens, J., dissenting). Importantly, many jurisdictions have expressly included *posthumous* reputation among the areas of protected interests. The value of an artistic creation, for example, fluctuates widely depending on the reputation of its creator, and a number of states allow the successors of artists to recover damages if the artist's work is damaged or altered in a way that harms the artist's reputa-

In addition to the law of privilege, numerous fields of human endeavor attest to the importance the living attach to their reputations after death. From time immemorial, literature, philosophy, religion, and other disciplines have recognized this human characteristic. For example, the Bible states:

> All these were honored in their generations, and were the glory of their times.
>
> There be of them, that have left a name behind them, that their praises might be reported.
>
> And some there be, which have no memorial; who had perished, as though they had never been; and are become as though they had never been born; and their children after them.[20]

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tion. See, *e.g.*, Cal. Civ. Code § 987(g)(1); Conn. Gen. Stat. § 42-116t(d)(1); Mass. Gen. L. ch. 231 § 85S(g); 73 Pa. Stat. Ann. § 2107(1). Similarly, several states have recognized the value of posthumous reputation by making it a misdemeanor to "blacken the memory of the dead." Robert E. Keeton, *et al.*, PROSSER & KEETON ON TORTS § 111 at 778–779 (5th ed. 1984); see also, *e.g.*, Colo. Rev. Stat. § 18-13-105; Ga. Code Ann. § 16-11-40; Idaho Code § 18-4801; Nev. Rev. Stat. § 200.510; N.D. Cent. Code § 12.1-15-01; 21 Okla. Stat. § 771; Utah Code Ann. § 76-9-501; Wash. Rev. Code § 9.58.010. Some states likewise have enacted statutes allowing new defamation actions to be brought, or pending actions to survive, even after the death of the defamed individual. See, *e.g.*, R.I. Gen. Laws § 10-7.1-1; 12 Okla. Stat. § 1441; Tex. Civ. Prac. & Rem. Code Ann. § 73.001; Utah Code Ann. § 45-2-2. See generally Francis M. Dougherty, Annotation, *Defamation Action as Surviving Plaintiff's Death, Under Statute Not Specifically Covering Action*, 42 A.L.R.4th 272 (1985) (collecting authorities). These bodies of law directly undermine the facile assumption of the court below that posthumous reputation is too slight an interest to merit judicial concern. See also *MacDonald* v. *Time, Inc.*, 554 F. Supp. 1053, 1054 (D.N.J. 1983) ("[t]o say that a man's defamed reputation dies with him is to ignore the realities of life and the bleak legacy he leaves behind").

[20] THE BIBLE: Apocrypha, at 44:7–9, quoted in John Bartlett, FAMILIAR QUOTATIONS 32:14 (16th ed. 1992). See also *id.*, Ecclesiastes 7:1, quoted in Bartlett at 24:6 ("[a] good name is better than precious ointment"); Leonidas of Tarentum, in THE GREEK ANTHOLOGY, no. 189 (Jay ed. 1973), quoted in Bartlett at 83:1 ("Far from Italy, far from my native Tarentum I lie; and this is the worst of it—worse than death. An exile's life is no life. But the Muses loved me. For my suffering they gave me a honeyed gift: My name survives me. Thanks to the sweet muses, Leonidas will echo throughout all time"); Juvenal, SATIRES, VIII, *l.* 83,

Writers such as Longfellow likewise have recognized the value people place on their reputations after death:

> Lives of great men all remind us
> We can make our lives sublime.
> And, departing, leave behind us
> Footprints on the sands of time.[21]

Thus, in the words of Shakespeare: "Mine honor is my life; both grow in one; Take honor from me, and my life is done."[22]

This natural human concern manifests itself in numerous ways. For example, Judge Tatel noted the many acts of philanthropy that indicate "that human beings care deeply about how posterity will view them." Pet. App. 22a–23a (Tatel, J., dissenting). A particularly vivid example is that of Alfred Nobel, the inventor of dynamite and founder of the Nobel Prize. Upon the premature report of his death, Nobel was criticized as a "'merchant of death' who had built a fortune by discovering new ways to 'mutilate and kill.'" This

> pained him so much he never forgot it. Indeed, he became so obsessed with his posthumous reputation that he rewrote his last will, bequeathing most of his

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quoted in Bartlett at 109:6 ("Count it the greatest sin to prefer life to honor, and for the sake of living to lose what makes life worth having"); Publilius Syrus, MAXIMS 108, 265, quoted in Bartlett at 99:2, 9 ("A good reputation is more valuable than money"; "What is left when honor is lost?").

[21] H. Longfellow, A PSALM OF LIFE st. 7, quoted in Bartlett at 440:17.

[22] W. Shakespeare, KING RICHARD THE SECOND, act I, sc. i., *l.* 182, quoted in Bartlett at 170:26. See also *id.*, *l.* 177, quoted in Bartlett at 170:25. ("[t]he purest treasure mortal times afford [i]s spotless reputation"); W. Shakespeare, OTHELLO, II, iii, 264, quoted in Bartlett at 206:20 ("Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial"); *id.*, III, iii, 155, quoted in Bartlett at 206:30, and in *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 12 (1990) ("Good name in man and woman, dear my lord, [i]s the immediate jewel of their souls; Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name [r]obs me of that which not enriches him, [a]nd makes me poor indeed"); M. de Cervantes, DON QUIXOTE DE LA MANCHA, pt. I, bk. IV, ch. 1, p. 226, quoted in Bartlett at 150:4 ("My honor is dearer to me than my life").

> fortune to a cause upon which no future obituary writer would be able to cast aspersions.

Kenne Fant, ALFRED NOBEL 207 (Ruuth transl. 1993). See also Nicholas Halasz, NOBEL 3–4 (1959).

Similarly, concerns about posterity and the post-death revelation of private information are evidenced in people's treatment of historical materials. Readers of autobiographies and memoirs are familiar with the common focus of authors on their enduring reputations and the judgment of history. What is more, such concerns have led numerous public officials to destroy their papers in anticipation of their deaths.[23] For example, Justice Black, in what was termed "Operation Frustrate the Historians," directed on the eve of his death that his Court papers be destroyed.[24] A number of other justices also have destroyed their papers,[25] as have several presidents.[26] And many prominent private citizens as well have

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[23] This has been true since the time of our nation's founding. For example, Charles Thomson, the Secretary to the Continental Congress throughout the Revolutionary War, destroyed his papers during his last years:

> Later during his retirement Thomson even destroyed most of his papers. He commented that he did so because, if the truth were known, many careers would be tarnished and the leadership of the nation would be weakened. Just what disgraceful deeds Thomson referred to will never be known, since the records his papers contained are lost forever.

J. Edwin Hendricks, CHARLES THOMSON AND THE MAKING OF A NEW NATION, 1729–1824, at 189 (1979).

[24] See Roger K. Newman, HUGO BLACK 621–622 (1994); see also Alexandra K. Wigdor, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES 48 (1986) (Justice Black ordered the destruction of his conference notes because of the "'fear that publishing them might inhibit the free exchange of ideas'" and because "'reports by one Justice of another's conduct in the heat of a difference might unfairly and inaccurately reflect history'"); *id.* at 34.

[25] See Wigdor at 4 ("until recently, judges have tended to destroy their working papers"). Chief Justice White and Justices Cardozo, McKenna, Minton, Peckham, Pitney, and Roberts destroyed their papers, and the papers of Justices Lurton and Wayne were destroyed by their survivors. *Id.* at 25 n.50, 35, 73, 140, 141, 154, 168, 169, 175, 219, 221.

[26] See Carl McGowan, *Presidents and Their Papers*, 68 MINN. L. REV. 409, 412–413 (1983); *Nixon* v. *United States*, 978 F.2d 1269, 1279–1280, 1287–1297

done the same thing.[27] Although human motivations are complex and sometimes difficult to ascertain, this experience is sufficient to belie the facile assumption of the majority below that the post-death disclosure of incriminating or embarrassing information would have little or no effect in discouraging candid attorney-client discussions.

As the foregoing demonstrates, it is a normal human trait to be concerned about one's reputation after death, and *amici* submit that people in general would be deterred from candid attorney-client communications by the knowledge that, under the panel's decision, the familiar privilege does not in fact protect against highly sensitive post-death disclosures. This deterrent effect would be especially great where, as apparently was the case here, the cli-

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(D.C. Cir. 1992). See also Introduction and Provenance to Index to Harding Papers, Library of Congress, Manuscript Division, at 3 (n.d.) (shortly after President Harding's death, his wife destroyed "any material which might have proven harmful to the memory of her husband"); Paul C. Nagel, THE LEES OF VIRGINIA: WOMEN 228 (1987) (President John Adams' granddaughter, who "devoted much of her life * * * to preserving letters and memorabilia of her famous grandparents and other relatives[,] * * * carefully pruned the manuscripts * * * in the hope that by burning letters she might brighten history's memory").

[27] See Frankel, 6 GEO. J. LEGAL ETHICS at 62 n.86 (" '[c]ontemplating their ultimate exits, Henry James, Walt Whitman, Charles Dickens and many others put their correspondence and private papers in the fire out of fear that some biographer might get hold of them'"); Karl E. Meyer, *Need a Sure Way to Settle an Argument Or Hide a Scandal? Burn the Letters*, N.Y. TIMES, Feb. 9, 1998, at A17.

Likewise, survivors often work to maintain or restore the reputation of their decedents. For example, Dr. Sam Sheppard was acquitted on retrial of murder charges after this Court reversed his initial conviction in a highly sensationalized trial (see *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966)), but the general public remained convinced of his guilt. He died a broken man in 1970, and his son has made extensive efforts to clear his father's name. See John Blades, *Presumed Guilty: Sam Sheppard's Son Struggles to Clear the Infamous—and Acquitted—Doctor's Name*, CHI. TRIB., Oct. 25, 1995, Tempo Section at 1. Similarly, even more than 100 years after his death, descendants are still seeking to establish the innocence of Dr. Samuel Mudd. Dr. Mudd treated John Wilkes Booth the day after President Lincoln was assassinated; he was convicted of complicity in the assassination and sentenced to life imprisonment, but was pardoned by President Andrew Johnson. See John E. McHale, Jr., *Dr. Mudd Deserves to Have His Name Cleared*, WASH. TIMES, Oct. 4, 1997, at B3.

ent consults the lawyer in contemplation of death. See Pet. App. 23a, 24a–25a (Tatel, J., dissenting); cf. *Jaffee*, 116 S. Ct. at 1929 & n.10. When death is expected or imminent—whether from advanced age, illness, suicide, or other cause—the client understandably is most likely to have in mind the way he will be remembered by his family, friends, business associates, and community in general. It is fanciful to say, as the panel did, that he would be unconcerned about his post-death reputation and undeterred by the prospect of disclosure of attorney-client communications. See Pet. App. 5a ("'[f]ew clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense'"). While the privilege is not limited to this situation, these circumstances make plain the error in the court of appeals' reasoning.[28]

Similarly, concern about post-death reputation is likely to be particularly significant where the client's professional life was founded on his good name. Here, for example, the client was himself a lawyer and, as such, his "professional reputation * * * [was his] most important and valuable asset." *Walker* v. *City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997); see also *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part) ("most lawyers are wise enough to know that their most precious asset is their professional reputation"). In fact, it is painfully clear that the client in this case placed the highest value on his reputation at the bar and in his community.[29] It thus

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[28] In fact, as the district court emphasized (Pet. App. 41a), "one of the first notations on the document is the word: 'Privileged.'" See also *id.* at 25a (Tatel, J., dissenting) (representation by counsel that "'I am totally certain * * * [that i]f I had not assured Mr. Foster that our conversation was a privileged conversation, we would not have had the conversation and there would be no notes that are the subject of the situation today'").

[29] In a commencement address to his law school *alma mater* shortly before his death, he observed the following:

> The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy. * * * I cannot make this point to you too strongly. There is no victory, no advantage, no fee, no favor which is worth even a blemish on your reputation for intellect and integrity. * * * Dents to the reputation in the legal profession are irreparable.

Vincent W. Foster, Jr., "Roads We Should Travel," Commencement Address at the Law School of the University of Arkansas (May 8, 1993), reprinted in Robert B. Fiske, Jr., REPORT OF THE INDEPENDENT COUNSEL: IN RE VINCENT W. FOSTER, JR. (June 30, 1994), app. 7. Likewise, in a note written around the time of his death, he expressed his deep concern that "in Washington * * * ruining people is considered sport." *Id.*, app. 5. Based on this and other evidence, the Fiske Report concluded that "[h]is professional reputation was of paramount importance to him." *Id.* at 8. See also Kenneth W. Starr, REPORT OF THE OFFICE OF INDEPENDENT COUNSEL ON THE DEATH OF VINCENT W. FOSTER, JR. 98 (1997) (his "'public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance'").

blinks reality to sweep aside, as the majority below did, the concern of clients for their reputations after death.

3. The absolute posthumous privilege is not undermined by the corollary rule that the privilege is inapplicable in cases involving claims by the deceased client's heirs.

In support of a qualified posthumous privilege, both the panel (Pet. App. 3a & n.1) and the Independent Counsel (IC Br. in Opp. 8–9, 15) place great weight on the so-called "testamentary" rule that the attorney-client privilege does not bar disclosure of the deceased client's confidential communications in cases involving claims by the client's heirs. They reason that this "exception" to the absolute posthumous privilege negates the privilege itself. This argument ignores the longstanding recognition of both the absolute privilege and the testamentary rule and misapprehends the rationale for the testamentary rule.

The law long has recognized both the absolute posthumous privilege and the testamentary rule. This Court, in applying the testamentary rule in certain situations (as discussed *infra*), accepted the continued existence of the absolute posthumous privilege in all other circumstances. See *Glover* v. *Patten*, 165 U.S. at 406–407; *Blackburn* v. *Crawfords*, 70 U.S. (3 Wall.) at 193. By itself, this historical co-existence refutes the assertion that the testamentary rule negates the basic privilege. On this question, in

Justice Holmes' apt phrase, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

Moreover, contrary to the assumption of the panel and the Independent Counsel, the testamentary rule is not an exception to or inconsistent with the absolute posthumous privilege. Rather, once the theory of the testamentary rule is correctly understood, it becomes clear that the rule is a corollary of and completely compatible with the absolute privilege.

As the panel noted (Pet. App. 3a n.1), the testamentary rule "applies only when the parties are claiming 'through the client,' not when a party claims against the estate." The rule rests on two rationales.

The first rationale reflects the fact that the identity of the holder of the privilege after the client's death may not be known at the time the privilege issue arises. This occurs, for example, in cases in which competing claimants each contend that he is the rightful heir of the deceased client. In that situation, it cannot be determined, prior to the conclusion of the litigation, who is the proper successor to the client and therefore who is the holder of the privilege entitled to invoke or waive it. As explained in the Advisory Committee Note to Proposed Federal Rule of Evidence 503:

> Normally the privilege survives the death of the client and may be asserted by his representative. * * * When, however, the identity of the person who steps into the client's shoes is in issue, as in a will contest, the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation. The choice is thus between allowing both sides or neither to assert the privilege, with authority and reason favoring the latter view.

Proposed Fed. R. Evid. 503, adv. comm. note (d)(2), 56 F.R.D. at 240. See also, *e.g.*, 3 WEINSTEIN'S FEDERAL EVIDENCE § 503.32 (McLaughlin ed., 2d ed. 1997); 2 Mueller & Kirkpatrick § 197 at 377–378. That rationale was adopted by this Court more than a century ago. *Glover* v. *Patten*, 165 U.S. at 406–407.

The second rationale is implied waiver where disclosure would serve to effectuate the deceased client's testamentary intent. In that situation, "if the decedent could be asked, he would want to waive the privilege so that the lawyer could dispose of the property according to his wishes." Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING § 1.6:101 at 131 n.5.7 (Supp. 1998). See also, *e.g.*, 2 Mueller & Kirkpatrick § 197 at 377. That rationale, too, has been endorsed by this Court. *Blackburn* v. *Crawfords*, 70 U.S. (3 Wall.) at 193–194.

Both of these theories for the testamentary rule in the limited circumstances in which it applies are entirely consistent with the general recognition of an absolute posthumous privilege in all other situations. As the panel acknowledged (Pet. App. 3a n.1), the law distinguishes between claims under the deceased client, to which the testamentary rule is applicable, and claims by third parties against the interest of the deceased client, to which the absolute privilege remains in full force. See *Glover* v. *Patten*, 165 U.S. at 406–407; *Blackburn* v. *Crawfords*, 70 U.S. (3 Wall.) at 193. The present case falls clearly within the latter category, and indeed there is not even a contention that the testamentary rule is applicable here (see Pet. App. 3a n.1). Accordingly, this case is controlled by the absolute posthumous privilege, and the existence of that privilege is not defeated by the testamentary rule.[10]

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[10] The majority below and the Independent Counsel also argue that most litigated cases involve the testamentary rule rather than the basic privilege. Even if true, that argument casts no doubt on the absolute privilege. First of all, given the important financial interests at stake, it is hardly surprising that much of the litigation that follows the death of clients would concern estate matters. Moreover, very few prosecutors have ever sought posthumous disclosure of attorney-client communications by arguing, contrary to settled understandings, that the well-established absolute privilege is transformed into only a qualified privilege upon the death of the client.

II. THE STRINGENT PROTECTION FOR MENTAL-IMPRESSION WORK PRODUCT APPLIES TO THE LAWYER'S NOTES OF HIS PRELIMINARY MEETING WITH THE CLIENT.

The majority below also held that the lawyer's notes of his meeting with his client were not protected by the attorney work-product privilege. The panel reasoned that factual materials contained in the lawyer's notes did not reflect the lawyer's mental impressions, thought processes, or strategies because "the interview was a preliminary one initiated by the client" and thus "the lawyer ha[d] not sharply focused or weeded the materials." Pet. App. 13a, 14a. Accordingly, it held that disclosure of factual materials in the subpoenaed notes was governed by the relatively lax work-product standard for purely factual materials—which "merely shifts the standard presumption in favor of discovery, so that [such materials] are discoverable where the person seeking discovery * * * [makes] a showing of 'substantial need' and 'the inability to obtain the substantial equivalent of the information . . . from other sources without "undue hardship"'" (*id.* at 11a–12a)—rather than by the stringent standard for mental-impression work product.

The majority's decision was patently erroneous and reflects a wholly unrealistic view of the responsibility and functioning of the legal profession. Moreover, it is rebutted by decisions of other courts that have recognized that the disclosure of factual materials can reveal an attorney's mental processes and therefore is subject to the most stringent work-product standard. A lawyer's notes of a meeting with a client that otherwise fall within the safeguards for mental-impression work product, as here, do not lose that protection simply because the meeting was a preliminary one requested by the client.

Unlike the attorney-client issue discussed above, the work-product question is not limited to situations in which the client has died. Nor is it limited to criminal cases but applies to civil litigation as well. Furthermore, preliminary client meetings occur across the country on a daily basis for lawyers of all kinds—private practitioners, in-house counsel, and even government attorneys. Unless reversed, the court of appeals' decision will have an immediate and detrimental effect on this day-to-day practice of law; just as the panel's attorney-client decision will deter clients from candid communications with their lawyers, so, too, its work-product decision will deter lawyers from "taking notes at early, critical meetings with clients," which "[n]ot only will * * * damage the ability of lawyers to represent their clients but in the end [will mean that] there will be no notes [to discover]." Pet. App. 31a (Tatel, J., dissenting from denial of rehearing in banc).[11]

A. A Strict Work-Product Privilege For An Attorney's Mental Impressions Is Essential To Our System Of Justice And Applies To The Disclosure Of Factual Information In An Attorney's Notes That Would Reveal His Thoughts And Judgments.

The work-product privilege recognizes that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman* v. *Taylor*, 329 U.S. 495, 510–511 (1947). Without such a doctrine, "[t]he effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.* at 511. In particular, absent work-product protection, "much of what is now put down in writing would remain unwritten." *Ibid.* The work-product "doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system." *United States* v. *Nobles*, 422 U.S. 225, 238 (1975). The doctrine reflects "strong 'public policy'" (*id.* at 236), and "its role in assuring the proper functioning of the criminal justice system is * * * vital." *Id.* at 238.

As this Court summarized in *Upjohn*, the work-product doctrine imposes a stringent standard of protection for the mental

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[11] The panel's ruling also will breed a disruptive and wasteful generation of work-product litigation as lawyers and courts struggle to determine what is meant by such elastic and undefined terms as a "preliminary" meeting or a "focus[ing] or weed[ing]" of the facts.

processes of attorneys. Some courts have adopted an absolute rule that "no showing" can overcome the privilege for such materials; other courts, while "declining to adopt an absolute rule," nonetheless have held that "such material is entitled to special protection" and is discoverable "'only in a rare situation.'" 449 U.S. at 401.[32] By contrast, as the panel below observed, factual information is subject to a less stringent balancing standard that takes account of the need for the information and its availability from other sources.

Notwithstanding this general division between mental impressions and facts, it is clear that the disclosure of factual materials in a lawyer's notes can reveal his mental impressions. For example, the factual information that a lawyer elicits from the client as helpful (or harmful) readily provides an open window into the lawyer's strategy and his judgments about the strengths and weaknesses of the case. See *Hickman*, 329 U.S. at 511 ("[p]roper preparation of a client's case demands that [the lawyer] assemble information"); *Upjohn*, 449 U.S. at 391 ("'a lawyer should be fully informed of all the facts of the matter he is handling'") (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY). In addition, the information the lawyer distills and chooses to memorialize from all that the client says also exposes his thought processes. See *Upjohn*, 449 U.S. at 399–400 (attorney's notes reflect "'what he saw fit to write down regarding witnesses' remarks'" and "'would be his [the attorney's] language, permeated with his inferences'"); *id.* at 391 ("'[i]t is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant'") (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY); *Hickman*, 329 U.S. at 511 (attorney must "sift what he considers to be the relevant from the irrelevant facts"); see also *Kalina* v. *Fletcher*, 118 S. Ct. 502, 510 (1997) ("the selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate").

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[32] In *Upjohn*, the Court found it unnecessary to resolve which of these two strict standards applies to mental-impression work product. 449 U.S. at 401–402.

In light of these practical realities, this Court has held that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Upjohn*, 449 U.S. at 399. Consistent with *Upjohn*, a number of courts of appeals have recognized that the compelled disclosure of factual information in an attorney's notes that will divulge his mental processes is subject to the stringent work-product standard of absolute or near-absolute protection. See, *e.g.*, *In re Allen*, 106 F.3d 582, 607–608 (4th Cir. 1997), cert. denied, 118 S. Ct. 689 (1998); *Cox* v. *Administrator, U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995); *In re Grand Jury Proceedings*, 473 F.2d 840, 841–842, 848 (8th Cir. 1973).[33] By instead applying the much less strict standard of need and alternative availability that relates to purely factual materials, the court below erred.[34]

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[33] Similarly, in applying the work-product and deliberative-process doctrines under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), courts have held that otherwise disclosable facts that reveal protected thought processes or deliberations are exempt from disclosure. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *EPA* v. *Mink*, 410 U.S. 73, 91 (1973); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Petroleum Info. Corp.* v. *Department of Interior*, 976 F.2d 1429, 1434–1436 (D.C. Cir. 1992); *Nadler* v. *Department of Justice*, 955 F.2d 1479, 1491–1492 (11th Cir. 1992); *Bristol-Myers Co.* v. *FTC*, 598 F.2d 18, 29–30 n.23 (D.C. Cir. 1978); *Kent Corp.* v. *NLRB*, 530 F.2d 612, 624 (5th Cir.), cert. denied, 429 U.S. 920 (1976).

[34] The cases cited by the Independent Counsel (IC Br. in Opp. 18)—which did not involve "preliminary" client interviews or asserted failures by counsel to "focus[ ]" or "weed[ ]" the facts—are not to the contrary. See *In re Grand Jury Investigation*, 599 F.2d 1224, 1228, 1231–1232 (3d Cir. 1979) (a lawyer's interview memoranda that "indirectly reveal the attorney's mental processes, his opinion work product" is "discoverable only in a 'rare situation'"; disclosure of memorandum of interview with deceased witness was ordered where "opinion work product * * * [would be] delete[d] * * * from the factual recitation" so that the lawyer's "'mental impressions, conclusions, opinions, or legal theories' [would be redacted]"); *In re John Doe Corp.*, 675 F.2d 482, 492–493 (2d Cir. 1982) ("the mental processes and legal theories of the interviewing attorney * * * are entitled to the greatest possible protection under the work-product immunity"; lawyer's notes of interview with still-living witness ordered disclosed where "the work-product itself * * * [was] part of a criminal scheme," and where disclosure "will

B. Because The Attorney Exercises His Professional Judgment In The Information He Elicits And Records, A Lesser Work-Product Privilege Does Not Apply To His Initial Meeting With A Client.

Contrary to the decision below, a lesser work-product standard does not apply here simply because this was a "preliminary [meeting] initiated by the client." Pet. App. 13a. Indeed, after *in camera* review (*id.* at 39a), the district court determined that the notes "'reflect the mental impressions'" of the attorney. *Id.* at 12a.

Even in a "preliminary" meeting, and no less in one "initiated by the client," the lawyer brings to bear his professional judgment and experience in representing his client in anticipation of litigation. See Pet. App. 30a–31a (Tatel, J., dissenting from denial of rehearing in banc). Although the discussion may be, as the panel suggested, "a fairly wide-ranging discourse from the client" (*id.* at 13a), that is not in any way inconsistent with the lawyer's professional efforts to elicit the information—pro and con—that he considers significant in formulating his strategy and planning future steps. See 1 Fred Lane, LANE GOLDSTEIN TRIAL TECHNIQUE § 1.03 at 3 (3d ed. 1997) & 1 (Supp. 1997) (the "initial client interview" is "[o]ne of the most important stages in legal representation" and "crucial to the preparation for trial"; "[t]he attorney's theory of the case is often shaped by information gathered from the client during the initial client interview"). Nor is the need for a "wide-ranging" discussion inconsistent with the lawyer's exercise of professional judgment as reflected in his decisions to include some but not other information in his notes, his choice of language to record the information, and his interlineated or marginal comments and questions that accompany the information. In this case, for instance, the lawyer—a highly experienced attorney in criminal cases—took only three pages of notes during a two-hour interview, thereby exercising considerable professional judgment as to what to write down, and he underlined and placed check marks and question marks by certain passages that he believed important for any number of possible reasons or future uses. See

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not trench upon any substantial interest protected by the work-product immunity" or "reveal anything worthy of the description 'legal theory' ").

id. at 31a (Tatel, J., dissenting from denial of rehearing in banc). Moreover, the record establishes (*id.* at 40a), as would be expected, that the attorney in fact prepared for the initial meeting with the client by reviewing materials and making notes, and thus he brought not only his experience but also his own information, questions, and legal opinions—however tentative or fragmentary—to the meeting.

In short, to say, as the panel did, that lawyers do not "sharply focus[ ] or weed[ ]" the facts at a "preliminary" client meeting in order to facilitate a "wide-ranging" discussion (Pet. App. 14a, 13a) is simply out of touch with the experience of practicing members of the bar. Even at an initial conference, the lawyer is exercising his professional judgment in both the information he elicits and the information he takes down. This process of obtaining and recording information is at the heart of the work-product privilege and is entitled to the most stringent protections.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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